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Klaus-Dieter Nehren

Heraeus 385-WCG

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NORRIS, MCLAUGHLIN & MARCUS, P.A.

875 THIRD AVE

18TH FLOOR

NEW YORK, NY 10022

EXAMINER

SHAVER, KEVIN P

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**Please find below and/or attached an Office communication concerning this application or proceeding.**

The time period for reply, if any, is set in the attached communication.

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS  
AND INTERFERENCES

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*Ex parte* KLAUS-DIETER NEHREN, and  
ALFRED VON SCMUCKMANN

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Appeal 2008-005039  
Application 10/055,658  
Technology Center 3700

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Decided:<sup>1</sup> May 28, 2009

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Before WILLIAM F. PATE III, STEVEN D.A. McCARTHY, and  
STEFAN STAICOVICI, *Administrative Patent Judges*.

WILLIAM F. PATE III, *Administrative Patent Judge*.

DECISION ON APPEAL

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<sup>1</sup> The two-month time period for filing an appeal or commencing a civil action, as recited in 37 CFR § 1.304, begins to run from the decided date shown on this page of the decision. The time period does not run from the Mail Date (paper delivery) or Notification Date (electronic delivery).

## STATEMENT OF CASE

This is an appeal from the final rejection of claims 1-6. These are the only claims in the application. We have jurisdiction over the appeal pursuant to 35 U.S.C. §§ 134 and 6.

The claimed invention is directed to an apparatus for emptying a hose bag. The apparatus consists of a cap-like mating part fixed at one of the bag with a pipe-shaped outlet opening containing a helical cutting device arranged for piercing the film of the hose bag.

Claim 1, reproduced below, is further illustrative of the claimed subject matter.

1. Apparatus for emptying a hose bag comprising a cap-like mating part fixed on one end of said hose bag, said cap-like mating part having a pipe-shaped outlet opening (3) and a helical cutting device comprising a double-edged helix-shaped cutting blade arranged therein for opening the hose bag.

## REFERENCES

The references of record relied upon by the examiner as evidence of obviousness are:

King	US 5,429,273	Jul. 4, 1995
Morel <sup>2</sup>	DE 38 73 178	May 24, 1988
Morel	US 4,898,293	Feb. 06, 1990

## REJECTION

Claims 1-6 stand rejected under 35 U.S.C. § 103 as unpatentable over King in view of Morel.

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<sup>2</sup>The US Patent to Morel is merely an English language equivalent of the German document. Like Appellants and the Examiner our decision will reference the US Patent.

Appellants argue that King does not have a cap fixed to the hose bag nor does King have a knife or blade to pierce the bag. Instead, according to Appellants, King uses a piercing tip 71 that is part of thread 70 on the nozzle 60. Appellants further argue that an essential feature of King is nipping a portion of the pouch between the nozzle and bore and this function would be destroyed if the tip of King were replaced by a knife or helical cutting blade. Therefore, according to Appellants, it would not have been obvious to substitute the tip with the knife or helical blade, because an essential feature of King would be eliminated.

In the Reply Brief, Appellants argue that King does not show a cap-like mating part fit on the hose bag and that Morel's blade has a different function than the blade disclosed in King. Appellants continue to argue that it would have not been obvious to replace King's tip with the cutter of Morel, because an essential purpose of King would be destroyed. Therefore, Appellants state that this is the antithesis of what is required to support a rejection under § 103.

### ISSUE

Accordingly, the issue for our consideration on appeal is whether Appellants have established that the Examiner erred in finding the subject matter on appeal was *prima facie* obvious over King in view of Morel. This issue turns on whether there is any rational basis for placing the Morel cutter in the King device.

### FINDINGS OF FACT

King discloses an apparatus for dispensing flowable materials from a tubular pouch. See col. 1, ll. 9-11. The operation of one embodiment of the

King dispenser is shown in Figs. 3a-3d. The tubular pouch 52 is placed in the body of the dispenser 33 and two ears 55 and 56 of the tubular pouch 52 are draped over the outside of cylindrical tube 33. See col. 4, ll. 8-19. Cap 34 is swung over to close the tube 33 trapping the ears 55 and 56 and fixing the cap 35 to the tubular pouch 52. See col. 4, ll. 19-24. Nozzle 44 has already been installed in spout 42 and nozzle 44 is twisted to drive the corkscrew tip 69 with piercing tip 71 into the film of the cylindrical pouch 52. Then as the nozzle member is backed outwardly of the pouch, film 76 is trapped between thread portions 70, 75 and bore 68. See col. 5, ll. 24-49.

Morel discloses a closure device for containers which includes a frangible membrane 3 sealing off the neck 2 of the container. The cap 4 of Morel is provided with a helical cutting member 11. To open the container of Morel, removable band 6 is removed from the neck of the container and a cap is screwed inwardly to pierce the membrane 3 by the point member 11. See col. 3, ll. 22-45.

#### PRINCIPLES OF LAW

“Section 103 forbids issuance of a patent when ‘the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains.’” *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 406 (2007). The question of obviousness is resolved on the basis of underlying factual determinations including (1) the scope and content of the prior art, (2) any differences between the claimed subject matter and the prior art, (3) the level of skill in the art, and (4) where in evidence, so-called secondary considerations. *Graham v. John Deere Co.*, 383 U.S. 1, 17-18 (1966). *See*

*also KSR*, 550 U.S. at 406-407 (“While the sequence of these questions might be reordered in any particular case, the [*Graham*] factors continue to define the inquiry that controls.”).

### ANALYSIS

In our view, it would have been obvious to replace the piercing tip 71 of King with a helical double edge cutting member such as the cutting member 11 of Morel. This is merely the simple substitution of one known element for another to obtain predictable results. See *KSR* at 417. In this instance it is the substitution of one prior art element that performs a piercing function with another such prior art element.

Appellants argue that King does not show a cap fixed to a tubular hose bag. On the contrary, it is our finding that King shows a cap 35, pivoted into position and locked or fixed to the tubular pouch when the King dispenser is in the closed position. Appellants argue that their device does not need flaps or ears on the pouch as King discloses. However, such structure is not precluded by the claims on appeal. Appellants argue that King’s lid must work in cooperation with the side of King’s container to clamp the ears. However this structure is not precluded by Appellants’ claims, either. Appellants state that it is difficult to tell exactly what part of King the Examiner would replace with Morel’s cutting blade. As the Examiner has explained, however, Morel shows a cutting blade placed over the tubular passage of the cap’s outlet end. Thus, Morel teaches the cutting portion axially aligned with the tubular passage.

Appellants further state that with the Morel cutting blade substituted for the King corkscrew tip, King’s device would not operate in the way it was designed to. We disagree. It is not the cutting tip of King that draws

the film between the threads and bore 68. It is the threads that performs this function. As long as the cutting tip forms a hole in the film that is smaller than the threads when the nozzle portion of King is withdrawn, the film 76 will be entrained as King discloses. Therefore, Appellants' argument that an essential function of King's device would be destroyed, is not credited.

In the Reply Brief, Appellants again argue that King requires ears to fasten the tubular pouch in the device. As note above, such ears are not precluded by Appellants' claims. Appellants again argue that the Examiner's proposed modification of King would change the functionality of the King device. We disagreed with this argument of Appellants, *supra*.

#### CONCLUSION OF LAW

For the above noted reasons, we conclude that the Appellants have failed to establish that the Examiner erred in rejecting claims 1-6 on the grounds of obviousness.

The rejection of claims 1-6 is affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a). *See* 37 C.F.R. § 1.136(a)(1)(iv) (2007).

#### AFFIRMED

vsh

NORRIS, MCLAUGHLIN & MARCUS, P.A.  
875 THIRD AVE  
18TH FLOOR  
NEW YORK, NY 10022